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In the Supreme Court of the United States

OCTOBER TERM, 1928

WHEELER LUMBER BRIDGE AND SUPPLY COMPANY OF DES MOINES, IOWA

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

U. S. GOVERNMENT PRINTING OFFICE: 1929

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v.

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OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims pursuant to Section 3(a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question certified is as follows (R. 4):

> Where lumber is purchased by a county from a private corporation for the purpose of repairing or building, directly through its

own employees, bridges in said county, said lumber to be delivered f. o. b. at a specified point and said lumber is shipped from various points consigned to the plaintiff or to the order of the shipper and payment of the freight charge is made by the county clerk of said county and the amount thereof deducted from the invoice price of said lumber, the balance of said invoice being later remitted by said county clerk to the plaintiff, are the services rendered in the transportation of said lumber rendered to said county within the provisions of Section 502 of the Revenue Act of 1917 (40 Stat. 314, 315) and Section 500 (h) of the Revenue Act of 1918 (40 Stat. 1101, 1102) and the decision of the Supreme Court of the United States in said case of the *Panhandle Oil Company* v. *The State of Mississippi*, 277 U. S. 218.

THE STATUTES INVOLVED

Revenue Act of 1917 (c. 63, 40 Stat. 300, 314, 315):

SEC. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum of the amount paid for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another * * *.

SEC. 501. That the taxes imposed by section five hundred shall be paid by the person,

corporation, partnership, or association paying for the services or facilities rendered.

* * * * *

SEC. 502. That no tax shall be imposed under section five hundred upon any payment received for services rendered to the United States, or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation prescribe.

SEC. 503. That each person, corporation, partnership, or association receiving any payments referred to in section five hundred shall collect the amount of the tax, if any, imposed by such section from the person, corporation, partnership, or association making such payments * * *.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1101, 1102, 1103:

SEC. 500. That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 500 of the Revenue Act of 1917—

(a) A tax equivalent to 3 per centum of the amount paid for the transportation on or after such date, by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water, of property by freight transported from one point in the United States to another * * *.

* * * * *

(h) No tax shall be imposed under this section upon any payment received for services rendered to the United States or to any State or Territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe.

SEC. 501(a) That the taxes imposed by section 500 shall be paid by the person paying for the services or facilities rendered.

* * * * *

SEC. 502. That each person receiving any payments referred to in section 500 shall collect the amount of the tax, if any, imposed by such section from the person making such payments * * *.

THE REGULATIONS

Regulations 42, issued March 18, 1918, under the Revenue Act of 1917, provide:

ART. 14. *Nature of exemption.*—Section 502 of the act exempts from taxation payments received for services rendered to the United States, to any State or Territory, or to the District of Columbia. The words "State" and "Territory" include political subdivisions thereof, such as counties, cities, towns, and other municipalities. The exemption, however, is to be secured only upon the production of such evidence of right to exemption as is called for by these regulations.

ART. 15. *Evidences of right to exemption.*—The right to exemption under section 502 from the tax on amounts paid for the transportation of property shall be evidenced in one of the following ways:

(a) Payment of such amounts directly to the carrier by the Government to which the services are rendered.

(b) A standard form of exemption certificate for use of the Federal Government, substantially in form following:

(Here appears form of certificate.)

(c) A form of exemption certificate, substantially in accord with the preceding form, for use by any of the States or Alaska or Hawaii, or any political subdivision thereof, or the District of Columbia, showing the political subdivision by which the charges have been, or will be, paid.

ART. 17. *Credentials.*—The credentials referred to on the margin of the exemption certificates are such papers, documents, or other evidences as will reasonably assure the officer, agent, or other employee collecting the transportation charge that the officer or employee issuing such certificate is an officer or employee of the Government on whose behalf the certificate is issued.

ART. 21. *Certificate required when charges paid.*—An exemption certificate for property or persons or other evidence of right to exemption, all as provided in articles 15 and

16, must be delivered to the carrier by the person paying the charges when the charges are paid; otherwise there shall be no exemption from the tax.

Similar provisions are contained in the Regulations under the 1918 Act. Additional pertinent provisions in the later Regulations are as follows:

Regulations 49, issued May 1, 1919, under the 1918 Act:

ART. 80. *Prepaid charges.*—Where transportation charges, either prepaid or collect, are paid by the shipper at origin of the shipment, or by a contractor at destination of the shipment, upon property shipped to the United States Government or to a State or Territory or the District of Columbia, or to a Government contractor, and the payment of such charges is in behalf of the Government, and the amount paid therefor is borne by the Government, such amounts are not subject to the tax. Exemption certificates properly signed by a governmental officer or employee must be furnished to the carrier as evidence of such rights to exemption.

Regulations 49, revised July 19, 1921:

Art. 97(d) The exemption does not apply to transportation charges which are not actually borne by a governmental agency. Thus, in the case of property sold to such an agency *f. o. b. destination,* the charges for transporting the property to point of delivery, being paid by the seller, would be taxable. (Italics ours.)

STATEMENT

The Wheeler Lumber Bridge and Supply Company (plaintiff below), during the years 1918, 1919, 1920, and 1921, sold certain quantities of lumber to nine counties in the State of Nebraska and one county in the State of Iowa. Said lumber was purchased for the purpose of building or repairing bridges in the respective counties, and the work involved was to be performed by county employees. Orders for the lumber were obtained by salesmen of the plaintiff company from the county commissioners or boards of county supervisors, and in each and every instance the prices quoted by the salesmen and accepted by the county officials were f. o. b. points of delivery in the respective counties, said points to be later designated. The lumber was accordingly shipped and was consigned to the plaintiff or to the order of the shipper at the designated points in the various counties. (R. 3, 12.)

Freight bills and invoices covering the shipments were forwarded to the county clerks by the plaintiff and upon arrival of the shipments the said clerks would present the freight bills to the railroad authorities, pay the freight charges, obtain receipted freight bills, and accept the shipments. The county clerks then deducted the amount of the freight charges from the invoices and forwarded to the plaintiff checks for the balance, together with the receipted freight bills. (R. 3, 12, 13.)

In each instance the amount of the check, plus the amount of the freight bill, totaled the price which the county contracted to pay for the lumber at the time the order was placed with the salesman. (R. 3, 13.)

SUMMARY OF ARGUMENT

The certificate of the Court of Claims raises only the question whether the transportation services involved were services rendered to the counties and therefore exempt from tax under the express provisions of the Revenue Acts of 1917 and 1918 and this Court's decision in *Panhandle Oil Co.* v. *State of Mississippi*, 277 U. S. 218. The certificate leaves no room for plaintiff's argument that even if such services were not services rendered to the counties, but to the plaintiff, the plaintiff is not taxable because both Revenue Acts provide that the tax shall be imposed upon those paying for the transportation, and in this case the freight charges were paid by the counties themselves.

If the question raised by plaintiff is properly presented, the plaintiff is nevertheless responsible for the tax because the counties, in paying the freight charges, were acting only as plaintiff's agents.

The *Panhandle Oil Company* decision is not controlling. The tax here involved was not laid upon the sale of the lumber to the counties. The lumber was sold to the counties f. o. b. points of desti-

nation in the counties. The tax was levied upon the transportation of the lumber to those points, the sale to the counties not being consummated until *after* the lumber had been so transported. No direct burden on the sale resulted from the tax.

ARGUMENT

I

PLAINTIFF CAN NOT RECOVER UNLESS THE TRANSPORTATION HERE INVOLVED WAS EXEMPT FROM TAX

The plaintiff argues that even if the services here in question are not services rendered to the counties, and therefore not exempt from the transportation tax under the Revenue Acts of 1917 and 1918, and the decision of this Court in *Panhandle Oil Company* v. *State of Mississippi*, 277 U. S. 218, nevertheless, since both Revenue Acts provide that the tax shall be paid by the person paying for the services or facilities rendered, and in this case the counties made the actual cash payment of the freight charges involved, the tax should also have been paid by the counties and the plaintiff was not liable therefor.

The question thus sought to be raised does not seem to be presented by the certificate of the Court of Claims. That certificate asks only whether the services are to be regarded as services rendered to the counties, and does not question that if they are not to be so regarded, and are not exempt from tax, the Government was within its rights in compelling

payment by the plaintiff, who was the shipper, consignee, and person ultimately responsible for the tax. And even if the question is properly presented, it seems clear that, since the counties were acting only as agents for the plaintiff, the plaintiff was the person paying for the services within the meaning of the Revenue Acts, and therefore responsible to the Government for the tax, although the Government might no doubt have insisted that the agents pay the tax with the transportation charges, and have refused to look to the principal for payment of the tax, upon the theory that the Government was not charged with determining the exact relation between principal and agent. That the Government *may* collect the tax from the agent with the transportation charges does not mean that it has no recourse against the principal in a case where the tax was not collected from the agent.

II

THE TRANSPORTATION HERE INVOLVED WAS NOT EXEMPT FROM TAX

So far as this case is concerned, we agree with the plaintiff that the statutory exemption from tax under the Revenue Acts is practically coextensive with the constitutional right of a State or subdivision thereof to exemption from Federal taxation. The question, therefore, in last analysis, is whether the transportation here involved was exempt from

tax under the decision of this Court in the *Panhandle Oil Company case*. In that case the Court said (p. 222):

> Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.

In the present case the sale to and purchase by the county was not the transaction by which the tax was measured and on which the burden rested. The sales were f. o. b. at points of destination. The tax was determined by the distance the plaintiff transported the lumber *before* the sale to the county, and was an expense preliminary to sale, not a burden upon the sale. Of course, all such expenses incurred prior to sale by a manufacturer or vendor probably add to the selling price of his product, but this does not make them a direct burden on the sale within the rule in the *Panhandle Oil Company case*.

CONCLUSION

The transportation services in question were not services rendered to the counties, and therefore were not exempt from tax under the Revenue Acts of 1917 and 1918 and the *Panhandle Oil Company*

decision. The plaintiff was properly responsible for the tax.

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APRIL, 1929.

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